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No.

In the Supreme Court of the United States

October Term, 1984

CALVIN M. PRICE,
Petitioner,

vs.

ALAN S. WHITMER, Superintendent, Missouri State Highway Patrol, et al.,
Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

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QUESTIONS PRESENTED FOR REVIEW

1. Should the Court of Appeals, in light of this Court's recent decision in *Western Air Lines, Inc. v. Criswell,* ..... U.S. ..... (No. 83-1545, June 17, 1985) have relaxed both parts of the accepted standard bona fide occupational qualification (BFOQ) test as established in *Usery v. Tamiami Trail Tours, Inc.,* 531 F.2d 224 (5th Cir. 1976), because of the public safety aspects of the employer Patrol?

2. In reviewing the evidence to determine whether the District Court's decision was "clearly erroneous," did the Court of Appeals engage in an impermissible *de novo* review in contravention of this Court's recent decision in *Anderson v. City of Bessemer City,* ..... U.S. ....., 105 S.Ct. 1504 (1985)?

3. Did the Court of Appeals, in reversing the District Court, inappropriately and impermissibly rely on the Federal Civil Service Statute in relaxing the Patrol's burden to justify its retirement age as a BFOQ in conflct with the recent decision of this Court in *Johnson v. Mayor and City of Baltimore,* ..... U.S. ..... (Nos. 84-518 and 84-710, June 17, 1985)?

4. Did the Court of Appeals, in reviewing the evidence to determine whether the District Court's determination that the Patrol's mandatory retirement age violated the ADEA was clearly erroneous, fail to consider the question from the standpoint of whether age is a BFOQ in each particular occupation (i.e., rank) within the Patrol and instead consider the question from the standpoint of the Patrol generally?

PARTIES TO THE PROCEEDINGS

The Petitioner is Calvin M. Price, a Lieutenant in the Missouri State Highway Patrol, who initiated this action as Plaintiff in the District Court in July 1981 alleging that the Missouri State Highway Patrol violated the Age Discrimination in Employment Act (ADEA), 29 U.S.C. § 621 *et seq.*, by imposing a mandatory retirement age of 60 for troopers. The Equal Employment Opportunity Commission (EEOC) thereafter filed a separate action in July 1982 against the Patrol alleging that the Patrol's maximum hiring age of 32 for troopers and radio operators, as well as its mandatory retirement age of 60 for all uniformed Patrol members violated § 4 of the ADEA. The actions were consolidated on August 25, 1982, and have remained so since.

The Respondents are Alan S. Whitmer who during the early proceedings in the District Court, was the Superintendent of the Missouri State Highway Patrol, and other state officials having responsibilities with the Missouri State Highway Patrol. While this case was pending in the District Court, Alan S. Whitmer retired and Howard J. Hoffman succeeded him as Superintendent of the Patrol.

Petitioner Price is advised that the EEOC is also submitting a petition for a writ of certiorari in this case.

TABLE OF CONTENTS

Questions Presented for Review I
Parties to the Proceedings II
Table of Contents III
Table of Authorities V
Opinions Below 1
Statement of Jurisdiction 2
Constitutional, Statutory and Regulatory Provisions Involved 2
Statement of the Case 3
Reasons for Granting the Writ—

I. Certiorari Should Be Granted Because the Decision of the Court of Appeals, in Holding That Because the Patrol's Jobs Involve Public Safety, the Patrol Bears a Lesser Burden Under Both Parts of the *Usery v. Tamiami Trail Tours, Inc.*, Test, Conflicts With Decisions of Other Circuits of the Court of Appeals and With This Court's Recent Decision in *Western Air Lines, Inc. v. Criswell*, ... U.S. ..... (No. 83-1545, June 17, 1985) 10

II. Certiorari Should Be Granted Because in Reviewing the District Court's Decision the Court of Appeals Engaged in an Impermissible De Novo Review of the Facts in Contravention of This Court's Recent Decision in *Anderson v. City of Bessemer City, Inc.*, ... U.S. ....., 105 S.Ct. 1504 (1985) 14

III. Certiorari Should Be Granted Because the Court of Appeals Inappropriately Relied on the Federal Civil Service Statute in Relaxing the

Patrol's Burden to Justify Its Retirement Age As a Bona Fide Occupational Qualification in Conflict With an Applicable Decision of This Court, *Johnson v. Mayor and City Council of Baltimore*, ... U.S. ..... (Nos. 84-518 and 84-710, June 17, 1985) 18

IV. Certiorari Should Be Granted Because the Court of Appeals' Opinion, in Reviewing the Evidence to Determine Whether the District Court's Determination That the Patrol's Mandatory Retirement Age Violated the ADEA Was Clearly Erroneous, Failed to Consider the Question From the Standpoint of Whether Age Is a Bona Fide Occupational Qualification in Each Particular Occupation (i.e., Rank) Within the Patrol and Instead Considered the Question From the Standpoint of the Patrol Generally, and in So Doing So Far Departed From the Accepted and Usual Course of Judicial Proceedings As to Call for an Exercise of This Court's Power of Supervision 20

Conclusion 24

TABLE OF AUTHORITIES

Cases:

Anderson v. City of Bessemer City, ... U.S. ....., 105 S.Ct. 1504 (1985) 15, 17-18

EEOC v. City of St. Paul, 671 F.2d 1162 (8th Cir. 1982) 11, 20, 21, 22, 23

EEOC v. Missouri State Highway Patrol, 555 F. Supp. 97 (W.D. Mo. 1982), *rev'd*, 748 F.2d 447 (8th Cir. 1984) 21, 22

EEOC v. Wyoming, 460 U.S. 226 (1984) 9

Graver Tank & Mfg. Co. v. Linde Air Products Co., 336 U.S. 271 (1949) 15

Hoefelman v. Conservation Comm'n of the Missouri Dept. of Conservation, 718 F.2d 281 (8th Cir. 1983) 15

Houghton v. McDonnell Douglas Corp., 553 F.2d 561 (8th Cir. 1977) 11

Johnson v. Mayor and City Council of Baltimore, ... U.S. ..... (Nos. 84-518 and 84-710, June 17, 1985) 19

Pullman-Standard v. Swint, 456 U.S. 273 (1982) 15

United States v. National Ass'n of Real Estate Boards, 339 U.S. 485 (1950) 14-15

Usery v. Tamiami Trail Tours, Inc., 531 F.2d 224 (5th Cir. 1976) 9, 11, 12, 13

Western Air Lines, Inc. v. Criswell, ... U.S. ..... (No. 83-1545, June 17, 1985) 11, 12, 14

Zenith Radio Corp. v. Hazeltine Research, Inc., 395 U.S. 100 (1969) 14

Statutes:

Age Discrimination in Employment Act of 1967, *as amended*, 29 U.S.C. § 621 *et seq.* .....*passim*

5 U.S.C. § 8335(b) 9, 18

Legislative and Miscellaneous Materials:

Age Discrimination in Employment: Hearings on H.R. 3651, H.R. 3768, and H.R. 4221 before the General Subcommittee on Labor of the House Committee on Education and Labor, 90th Cong., 1st Sess. 9 (1967) 12

Age Discrimination in Employment: Hearings on S.830 and S.788 before the Subcommittee on Labor of the Senate Committee on Labor and Public Welfare, 90th Cong., 1st Sess., 37-38, 51-52 (1967) 12, 13

The Older American Worker, Report of the Secretary of Labor, 5-7 (1965), *reprinted in Legislative History of the Age Discrimination in Employment Act* (EEOC, 1981); 113 Cong. Rec. 34742, 34746 (1967) 13

Rule 52(a), Fed. R. Civ. P. 14, 18

9 C. Wright & A. Miller, Fed. Prac. and Proc. 14, 15

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OPINIONS BELOW

The December 22, 1982, Memorandum and Order of the United States District Court for the Western District of Missouri, Central Division (per Judge Scott O. Wright), which granted Petitioner injunctive relief is reported at 555 F.Supp. 97 (W.D. Mo. 1982), and is set forth as Appendix B to the Petition for Writ of Certiorari filed by the Equal Employment Opportunity Commission (EEOC) in this case. Respondent appealed from this order to the United States Court of Appeals for the Eighth Circuit.

The Opinions (majority opinion by Judge Pasco Bowman, Judge John R. Gibson, concurring, reversing the Dis-

trict Court; dissenting opinion by Judge Theodore McMillian) of November 12, 1984, by the United States Court of Appeals for the Eighth Circuit are set forth in Appendix A to the Petition for Writ of Certiorari filed by the EEOC and are reported at 748 F.2d 447 (8th Cir. 1985). The Order of January 28, 1985, of the Court of Appeals denying Petitioner's (and the EEOC's) motion for rehearing (Judges Heaney, McMillian and Arnold *would have granted the petitions for rehearing*) is set forth as Appendix D to the EEOC's petition and is unreported. The Court of Appeals' judgment is set forth as Appendix C to the EEOC's petition.

STATEMENT OF JURISDICTION

The judgment of the United States Court of Appeals was entered November 12, 1984. Petitioner's Motion for Rehearing en banc was denied by order entered January 28, 1985. By Order entered on April 20, 1985, Mr. Justice Blackmun extended the time for Petitioner to file a petition for writ of certiorari to June 27, 1985 (No. A-799). The jurisdiction of this Court is invoked pursuant to 28 U.S.C. § 1254(1).

CONSTITUTIONAL, STATUTORY AND REGULATORY PROVISIONS INVOLVED

Relevant portions of the Age Discrimination in Employment Act (ADEA), 29 U.S.C. § 621, *et seq.* and of Sections 43.060, 104.080, and 104.010, Revised Statutes of Missouri, are set forth in the Petition for Writ of Certiorari filed by Petitioner Equal Employment Opportunity Commission in this case.

STATEMENT OF THE CASE

Petitioner Price was the operations lieutenant at the Patrol's Troop F in Jefferson City and had been with the Patrol at the time of trial for 33 years. On June 9, 1981, he attained the age of 60. He had been advised earlier in 1981 that if he wished to serve the Patrol beyond June 9, 1981, he was required to request an extension. He requested such on May 6, 1981, but was told by Respondent Whitmer that he must retire on July 1, 1981.

Thereafter, Petitioner Price filed a complaint in July 1981, alleging that the Missouri State Highway Patrol violated the Age Discrimination in Employment Act (ADEA), 29 U.S.C. § 621 *et seq.* by imposing a mandatory retirement age of 60 for troopers. The Equal Employment Opportunity Commission filed a separate action in July 1982, alleging that the Patrol's maximum hiring age of 32 for troopers and radio operators as well as its mandatory retirement age of 60 for uniformed members violated § 4 of the ADEA. The actions were consolidated on August 25, 1982. After a five-day trial in November 1982, the District Court issued an order and memorandum on December 22, 1982, holding that "the mandatory retirement age of 60 for all uniformed members of the Patrol violates the ADEA. . . ." Subsequent to the District Court's ruling and during all proceedings in the Eighth Circuit Court of Appeals, Petitioner Price continued to work as a lieutenant in Troop F until he was ordered retired by the Patrol as of May 1, 1985, when he was less than two months short of age 64.

The District Court's findings regarding the Patrol's mandatory retirement policy are undisputed. Before June 1982, Section 104.080, Revised Statutes of Missouri, required that all uniformed members of the Patrol retire

at age 65, but the Superintendent of the Patrol had discretion to extend the employment between age 55 and 65. The District Court found that:

> Since 1945, the Patrol has adhered to a policy of mandatorily retiring all uniformed members at age 60 without regard to a member's health, job responsibilities or job performance.

The District Court found that the Superintendent routinely extended people to age 60, even if the person was in poor health, unless that Patrol member was unable to perform any job. Subsequent to the filing of this action the statute was amended in 1982 and the retirement age was lowered to 60.

With respect to the duties of the Patrol members, the District Court found that all members are expected to be able to do road work, but also found that when "the rank of a Patrol member increases, the frequency with which members are exposed to physically strenuous or dangerous activities decreases." Patrol Troops (geographical areas consisting of several counties—13 counties in the case of Troop F where Lt. Price was stationed) are commanded by captains, and under them there are usually two or three lieutenants who exercise command and administrative responsibilities over the numerous sergeants, corporals and troopers who perform patrolling duties. The position of lieutenant is essentially and primarily an administrative or desk job. According to a computer analysis of the Patrol's records, troopers (the lowest rank) account for 56% of the arrests made, while corporals account for 19%, sergeants 13%, and lieutenants (which Petitioner Price was) and captains less than 1%. For example, the District Court found that lieutenants were responsible for only .01% of the arrests in 1982, .04% in 1979, .01% in 1980, and .02% in 1981.

All retired Patrol members who testified had been promoted from trooper to other positions. These positions were desk jobs or involved administrative duties and did not include road work on a regular basis. The District Court found that "since 1978 all members of the Patrol who were mandatorily retired held the rank of corporal or above."

The District Court found that the Patrol has no physical fitness program for its members. Col. Howard Hoffman, Superintendent of the Patrol at the time of trial, testified that the Patrol had discontinued a physical fitness program because some of the men were not in shape and were injured by it. He testified that there were probably patrolmen on the road who could not pass the physical fitness program administered to cadets at the Patrol's training academy but that it is not necessary to keep in shape to do road duty.

Patrol members, once they leave the training academy, are not given complete medical examinations on a regular basis nor are they regularly tested to determine if they are physically capable of performing their jobs. The Patrol has no weight restrictions and physical fitness is not a factor in awarding promotions. The District Court also found that "a number of members of the Patrol have suffered heart attacks and have been permitted to return to their regular job duties." The Court also found that every "member of the Patrol who had a heart condition and who applied for an extension of employment between the ages of 55 and 60 was granted an extension." Nevertheless, Patrol officials testified and the Court found that "[n]o member of the Patrol has ever had a heart attack while performing physically strenuous activities or encountering a psychologically stressful situation."

Petitioner Price testified that he was in good health and was fully capable of performing his job. This was corroborated by his personal physician. Price had not been criticized about his job performance and Superintendent Hoffman testified that Price was "fully capable" of performing his job. The District Court found that Price "is in excellent health and is under no restrictions with respect to the performance of his present Patrol duties."

There was considerable testimony that judgment, experience and maturity were important attributes of a patrolman, and that such increased with age and experience on the Patrol. Missouri permits its correctional officers who must cope with emergency prison disturbances to work until age 70.

In its decision, the District Court found that defendants failed to prove that the mandatory retirement age of 60 for troopers was a bona fide occupation qualification (BFOQ) under the ADEA, because the Patrol did not show "that substantially all persons over age 60 are unable to safely and efficiently perform the duties of a patrolman, or that some persons over age 60 possess traits precluding safe and efficient performance unascertainable other than through knowledge of the patrolman's age."

The District Court specifically found the testimony of the Patrol's experts unconvincing, in part because it was contradicted by the Patrol's own practices. The Court stated that the testimony of the Patrol's physiologist, Dr. Lind, was "overly generalized and was not factually based on the duties of patrolmen" and that "the Patrol does not even heed its expert's advice." For example, the Court noted that although Dr. Lind did not think that the average sedentary 45-year-old had sufficient aerobic capacity to perform the job, the "Patrol has routinely and success-

fully allowed Patrolmen to work up to the age of 60." The Court also found that although Dr. Lind had testified that the qualities of aerobic capacity, adaptability to heat, strength, endurance, vision and hearing were important to the job and could be tested, "the Patrol has not undertaken to measure the abilities of its members with respect to those factors."

The District Court noted that although the Patrol's cardiology expert, Dr. Antlitz, testified that coronary artery disease increases with age "[t]he increase in risk is minimal and is present for members of the patrol whose ages are in their 30's." The Court also found that the "genuineness of the Patrol's concern about the increased risk of coronary heart disease is questionable, however, since the Patrol has placed members who have had heart attacks in road-working jobs and has not exempted older members of the Patrol from road work."

Instead, the District Court credited the testimony of the EEOC's experts, Drs. Mohler and Cureton. The Court found that the "rebuttal evidence offered by the EEOC established that persons who are 60 years of age or older can perform the duties of the Patrol and that age alone is a poor predictor of a person's ability to perform safely and efficiently." The Court found, in accordance with Dr. Mohler's testimony, that a member of the Patrol needs three qualities to perform well: "be free from impairing diseases, be able to perform, and be motivated to perform." The Court further found that a "Patrolman's functional age, rather than chronological age is a better determinant of his or her ability to perform" and that physicians could "determine with reasonable accuracy whether a member of the Patrol is able to perform his or her duties."

The District Court accepted Dr. Cureton's testimony that the "physical abilities needed to perform law enforce-

ment duties are easily tested." The Court stated that "[i]f the Patrol is genuinely concerned about the well-being of the public and its officers, it can readily evaluate its members and discharge those who cannot perform to standard."

The District Court also rejected the Patrol's claim that the mandatory retirement policy was needed to protect retirement benefits and the claim that it was needed to promote morale by ensuring advancement for younger members.

The Eighth Circuit Court of Appeals reversed the District Court's decision with respect to the mandatory retirement age issue. In the panel's 2-1 decision, the majority found the "Patrol's evidence highly persuasive" and "that there is a factual basis for believing that substantially all Patrol members over the age of sixty lack sufficient aerobic capacity to perform their duties safely and efficiently." The Court of Appeals further found that:

> In light of the fact that public safety and lives depend upon the capabilities of Patrol members, and in light of the overwhelming evidence of declining physical ability and increasing coronary risk among persons who have reached the age of sixty, we hold that the Patrol clearly has justified its mandatory retirement age.

In reaching this result, the Court of Appeals found the District Court's conclusion that the Patrol's expert evidence was unpersuasive and often contradictory "wholly unsupported by the record." The Court of Appeals accused the District Court of erroneously emphasizing the fact that the Patrol does not require its members to participate in a regular physical fitness program, dismissing the Patrol's expert evidence on the greater likelihood of

coronary artery disease in older persons as "minimal," relying heavily on the plaintiffs' experts and failing to consider deficiencies in their testimony. The Court of Appeals "also [found] it persuasive that Congress, which has chosen to extend the ADEA to states and their political subdivisions, authorizes a general mandatory retirement age of fifty-five for federal law enforcement personnel such as FBI agents, CIA agents, United States Marshals, and Secret Service agents. *See* 5 U.S.C. § 8335(b)." The majority also found support for its decision "in recent decisions of the First and Fourth Circuits. *See Mahoney v. Trabucco,* 738 F.2d 35 (1st Cir. 1984) (upholding as a BFOQ a mandatory retirement age of fifty for Massachusetts state police); *Johnson v. Mayor of Baltimore,* 731 F.2d 209 (4th Cir. 1984) (upholding as a BFOQ a mandatory retirement afe of fifty-five for City of Baltimore firefighters; mandatory retirement age for federal firefighters a reasonable federal standard against which to compare mandatory retirement age of city firefighters)."

In dissent, Judge McMillian stated that he did not agree that the District Court's findings that age is not a BFOQ for retirement or for hiring radio operators "are clearly erroneous and would affirm." He noted that the majority's reliance on the federal mandatory retirement age of 55 for federal law enforcement personnel was misplaced and that a similar argument had been rejected in *EEOC v. Wyoming,* 460 U.S. 226 (1984). He also found of "limited relevance" the majority's "characterization of the state highway patrol as a paramilitary organization with public safety responsibility," noting that "the public safety responsibility of state highway patrol troopers is relevant only to the second part of the BFOQ test as set forth in *Usery v. Tamiami Trail Tours, Inc.,* 531 F.2d 224, 235-36 (5th Cir. 1976). . . ."

Finally, Judge McMillian noted that the BFOQ "standard is highly sensitive to the factual record in individual cases" and stated that he could not find the District Court's specific findings of fact were clearly erroneous.

Price and the EEOC filed petitions for rehearing en banc which were denied by order of January 28, 1985. The Court's order denying the petitions for rehearing specifically noted that Circuit Judges Heaney, McMillian and Arnold would have granted the petitions.

REASONS FOR GRANTING THE WRIT

I.

Certiorari Should Be Granted Because the Decision of the Court of Appeals, in Holding That Because the Patrol's Jobs Involve Public Safety, the Patrol Bears a Lesser Burden Under Both Parts of the Usery v. Tamiami Trail Tours, Inc., Test, Conflicts With Decisions of Other Circuits of the Court of Appeals and With This Court's Recent Decision in Western Air Lines, Inc. v. Criswell, ... U.S. ..... (No. 83-1545, June 17, 1985).

Under present Missouri law, all members of the Patrol (be they the superintendent or a trooper "working the road") must retire at age 60. Petitioner and the EEOC challenged these restrictions as violative of the Age Discrimination in Employment Act (ADEA), 29 U.S.C. § 621 *et seq.* The Patrol defended the limitations as "bona fide occupational qualifications" (BFOQ) under § 4(f)(1) of the Act, 29 U.S.C. § 623(f)(1). To sustain that defense, the Patrol was required to prove that (1) the job qualifications it invoked to justify the discrimination were rea-

sonably necessary to the essence of its business, and (2) it had a factual basis for believing that all or substantially all of the older employees are unable to perform their duties safely and efficiently or that some older employees possess traits precluding safe and efficient job performance unascertainable other than through knowledge of the employee's age, the so-called "*Tamiami* test," adopted by the Eighth Circuit in *EEOC v. City of St. Paul*, 671 F.2d 1162 (8th Cir. 1982); *Houghton v. McDonnell Douglas Corp.*, 553 F.2d 561 (8th Cir.), *cert. denied*, 434 U.S. 966 (1977), *citing Usery v. Tamiami Trail Tours, Inc.*, 531 F.2d 224 (5th Cir. 1976). Just several days ago, this Court noted that the *Tamiami* two-part inquiry had been implicitly endorsed by Congress, embraced by EEOC regulations and that "Every Court of Appeals that has confronted a BFOQ defense based on safety considerations has analyzed the problem consistently with the *Tamiami* standard." *Western Air Lines, Inc. v. Criswell*, ... U.S. ..... (No. 83-1545, June 17, 1985, slip op. at 13-14). Petitioner submits that the Eighth Circuit, with its decision in this case, is an exception to the Court's observation.

Although the Eighth Circuit had ostensibly adopted the two-part *Tamiami* test, it cannot be seriously disputed that the panel majority, while paying lip service to the test, relaxed the standard. In its decision the Court of Appeals found that the Patrol had justified its mandatory retirement age under the second part of the BFOQ test in light of the evidence and "[i]n light of the fact that public safety and lives depend upon the capabilities of Patrol members. . . ." This legal framework is at odds not only with *Tamiami* and the Eighth Circuit's earlier *St. Paul* and *Houghton* decisions, but with this Court's decision in *Western Air Lines, supra.*

Petitioner submits that the Court of Appeals' view that, because the Patrol's jobs involve public safety, the Patrol bears a lesser burden under both parts of the *Tamiami* test is erroneous. As Judge McMillian pointed out in dissent, safety concerns are relevant only to whether the job qualifications for the position in question, which the employer invokes to justify its age limitations, are "reasonably necessary" to the essence of its business. The *Tamiami* court observed that the employer's burden under this prong in public safety cases is relatively light (but not lessened) simply because the trier of fact may easily be persuaded to find that stringent qualifications are "reasonably necessary" where an employee's poor performance could create a risk of harm to many people. *Tamiami*, 531 F.2d at 236.

However, the fact that jobs involve public safety does not lessen the employer's burden to prove by a preponderance of the evidence the remaining *Tamiami* prong, i.e., that substantially all older workers lack these qualifications or that the qualifications can be ascertained only by reference to age. *Western Air Lines, supra.* The fundamental principle underlying the ADEA is that older workers are entitled to be evaluated based on their abilities rather than age. Congress anticipated that the BFOQ exception would be available only in rare instances, and that in almost all occupations individual assessments could be made. *Age Discrimination in Employment: Hearings on H.R. 3651, H.R. 3768 and H.R. 4221 before the General Subcommittee on Labor of the House Committee on Education and Labor*, 90th Cong., 1st Sess. 9 (1967); *Age Discrimination in Employment: Hearings on S.830 and S.788 before the Subcommittee of Labor of the Senate Committee on Labor and Public Welfare*, 90th Cong., 1st Sess. 37-38, 51-52 (1967). There is no indication that

Congress intended the courts to defer to the judgment of employers—whether or not they were involved in public safety—concerning the feasibility of individualized assessment and the need for age limits. To the contrary, Congress found that age limitations in industry were generally adopted without study and based on unfounded assumptions about the relationship of age to job performance. *See, e.g. The Older American Worker, Report of the Secretary of Labor*, 5-7 (1965), *reprinted in Legislative History of the Age Discrimination in Employment Act* (EEOC, 1981); 113 Cong. Rec. 34742, 34746 (1967); *Senate Hearings, supra*, at 34, 38. Strict adherence to *Tamiami's* requirement that all employers prove by a preponderance of the evidence that age restrictions are reasonably necessary will encourage those like the Patrol to carefully evaluate both the needs of safety and their obligations to eliminate unnecessary age discrimination, with a net gain to the public on both accounts.

It is important to note that the Respondents, in their brief to the Eighth Circuit, urged the Eighth Circuit to abandon the *Tamiami* test and replace it with a "rational basis" standard, citing *Massachusetts Board of Retirement v. Murgia*, 427 U.S. 307 (1976). There is considerable evidence that the Court of Appeals was impressed with this argument and although continuing to pay lip service to *Tamiami*, adopted the Respondent's misguided argument:

> The Patrol's obligations to the public mean that Patrol members of all ranks work the road, handle abusive and violent motorists, engage in high speed chases, assist motorists, and participate in other strenuous field work. Although a Patrol member may call for assistance, emergency situations do not always accord him the luxury of waiting for help. *In light of these obligations and demands upon Patrol members,*

> *the Patrol has clearly established that physical ability and ability to withstand stress are job qualifications which are reasonably necessary to the performance of its functions, and that in these terms there is a correlation between the mandatory retirement age of sixty and the safe and efficient performance of the Patrol's functions. Cf. Massachuetts Board of Retirement v. Murgia*, 427 U.S. 307 (1976).

Opinion below (Emphasis added).

It is clear the Court of Appeals imposed a lesser burden on the Patrol than the Court has now made clear should have been imposed. Petitioner Price submits certiorari is appropriate so that the decision of the Court of Appeals may be reviewed and reversed or so the case may be remanded to the Court of Appeals for reconsideration in light of *Western Air Lines, Inc., supra.*

II.

Certiorari Should Be Granted Because in Reviewing the District Court's Decision the Court of Appeals Engaged in an Impermissible De Novo Review of the Facts in Contravention of This Court's Recent Decision in Anderson v. City of Bessemer City, Inc. ..... U.S. ....., 105 S.Ct. 1504 (1985).

Under the "clearly erroneous" standard of review, Rule 52(a), Fed. R. Civ. P., an appellate court must not consider and weigh evidence *de novo*, supplanting the District Court's judgment with its own (*Zenith Radio Corp. v. Hazeltine Research, Inc.*, 395 U.S. 100, 123 (1969)), but should reverse "only if the finding is without adequate evidentiary support or induced by an erroneous view of the law." 9 C. Wright & A. Miller, *Federal Practice and Procedure* § 2585, at 732-734 (1971); *see also United States v.*

National Ass'n of Real Estate Boards, 339 U.S. 485, 495-96 (1950). Findings of fact based on contradictory expert testimony are the "particular province of the District Court (*Hoefelman v. Conservation Commission of the Missouri Dept. of Conserv.*, 718 F.2d 281 (8th Cir. 1983)), and an appellate court "must be especially reluctant to set aside a finding based on the trial judge's evaluation of conflicting oral testimony." 9 C. Wright & A. Miller, *Fed. Pract. and Proc.* § 2586, at 737. *See also, e.g., Graver Tank & Mfg. Co. v. Linde Air Products Co.*, 336 U.S. 271, 275 (1949). This Court recently noted that:

> When findings are based on determinations regarding the credibility of witnesses, Rule 52 demands even greater deference to the trial court's findings; for only the trial judge can be aware of the variations in demeanor and tone of voice that bear on the listener's understanding of and belief in what is said.

Anderson v. City of Bessemer City, ... U.S. ....., 105 S.Ct. 1504, 1512 (1985).

In its opinion, written before the *Anderson* decision, the panel majority correctly stated that it should apply the "clearly erroneous" standard, but then improperly conducted a *de novo* review of the record and made an independent determination of whether the employer (the Patrol) had proven as a matter of fact that age was a bona fide occupation qualification (BFOQ). An appellate court's recitation of the correct standard of review is not decisive of the question of whether the court actually followed that standard. *See Pullman-Standard v. Swint*, 456 U.S. 273, 290-91 (1982).

Space will permit only a few examples of the Court of Appeals' erroneous approach.

1. The Court of Appeals' majority disagreed with the District Court's finding that chronological age alone is a poor determinant of ability or risk. The lower court entered that finding after weighing contradictory expert testimony. The plaintiffs' expert, Dr. Mohler, explained, drawing from several studies, that there are wide variations in risk among individuals of the same age. Factors such as blood pressure, cholesterol, and smoking are significant determinants of risk. Although the Patrol's expert, Dr. Antlitz, testified that age is a significant risk factor, even he conceded that either smoking or high blood pressure, for example, doubles the risk at any age, and that the possibilities of coronary disease can be predicted by knowing those risk factors. Dr. Mohler discussed the results of the Framingham Study, for example, which showed that a healthy 60-year-old will only have one-third the risk of a cardiac incident in the following eight years as that of a "high risk" 45-year-old. In short, Dr. Mohler's testimony confirms that many 60-year-olds have a significantly lower risk of cardiac incident that "high risk" younger people who may comprise a large proportion of the Patrol, since it does not test or screen its employees' health.

With respect to "aerobic capacity" (the body's ability to utilize oxygen without drawing on muscle reserves which induces fatigue), the majority found that by age 60, 90% of all Patrol members could not perform their duties. The testimony of the Patrol's expert, Dr. Lind, was that 90% of 60-year-olds do not have the aerobic capacity he deemed desirable. The majority ignored his admission that he arrived at that figure by including smokers and the overweight, and that exclusion of those would alter his conclusion. Moreover, he admitted that the "3 liters per minute" he postulated as the necessary ca-

pacity for patrolmen was an extrapolation from data for firemen. Thus, contrary to the majority, the District Court accurately found that Dr. Lind's testimony was "not factually based on th- duties of the patrolmen."

The Court of Appeals' majority also disagreed with the District Court's finding that tests determine with great accuracy an individual's ability to perform safely and effectively, notwithstanding the testimony of plaintiffs' experts, Drs. Mohler and Cureton—and Dr. Lind himself—that necessary traits such as agility, endurance, muscle strength, reaction time, hearing and vision, for example, can be tested. The majority particularly took issue with the lower court's finding that "[w]hen a treadmill test is joined with a complete risk factor analysis, physicians can identify nearly every person who is likely to have a heart attack in the following years." The majority credited the testimony of Patrol experts Drs. Antlitz and Westhoff, that testing was not accurate, over Dr. Mohler's detailed testimony that when specified medical data is obtained, a specific stress test is performed, and the individual is "clear on these factors," physicians can determine with a probability of .017 that an individual will not have a cardiac incident in the ensuing five years.

Resolving such conflicts in testimony is the province of the trial court. The Court of Appeals' recitation of alleged "serious deficiencies" in the plaintiffs' experts' testimony reveals nothing more than it usurped the role of the District Court and accepted the Patrol's invitation that it try the case anew. In this case, Petitioner submits the District Court's finding was "based on his decision to credit the testimony" of the plaintiffs' witnesses, "each of whom . . . told a coherent and facially plausible story that [was] not contradicted by extrinsic evidence." *An-*

derson, supra at 1513. The Court of Appeals, however, duplicated the trial judge's efforts in contravention of *Anderson* and Rule 52 and for this reason Petitioner Price submits that certiorari should be granted so that the Court of Appeals' decision may be reviewed and reversed or so that the cause may be remanded to the Court of Appeals for purposes of reconsideration in light of this Court's decision in *Anderson.*

III.

Certiorari Should Be Granted Because the Court of Appeals Inappropriately Relied on the Federal Civil Service Statute in Relaxing the Patrol's Burden to Justify Its Retirement Age As a Bona Fide Occupational Qualification in Conflict With an Applicable Decision of This Court, Johnson v. Mayor and City Council of Baltimore, ... U.S. ..... (Nos. 84-518 and 84-710, June 17, 1985).

In reaching its decision reversing the District Court on the mandatory retirement age issue, the Court of Appeals' majority found it "persuasive that Congress, which has chosen to extend the ADEA to states and their political subdivisions, authorizes a general mandatory retirement age of fifty-five for federal law enforcement personnel such as FBI agents, CIA agents, United States Marshals, and Secret Service agents. *See* 5 U.S.C. § 8335(b)."

The fact that the federal civil service statute cited by the Court of Appeals permits age 55 mandatory retirement of federal law enforcement personnel, contrary to the view of the Court of Appeals, provides no basis for relaxing the Patrol's burden to justify its retirement age as a BFOQ. As this Court announced, just several days ago, in

Johnson v. Mayor & City Council of Baltimore, ... U.S. ..... (Nos. 84-518 and 84-710, June 17, 1985):

> In sum, almost four decades of legislative history establish that Congress at no time has indicated that the federal retirement age for federal firefighters is based on a determination that age 55 is a bona fide occupational qualification within the meaning of the ADEA.
>
> * * *
>
> In the absence of an indication that Congress in fact grounded the age limit on occupational qualifications, we will not presume that it did so intend. The myriad political purposes for which Congress might properly make decisions affecting federal employees, and that body's uncontested authority to exempt federal employees from the requirements of federal regulatory statutes, simply do not permit the conclusion that Congress passed or retained this retirement provision because it reflects bona fide occupational qualifications.

Johnson, slip op. at 15, 16.

Because of the Court of Appeals' misplaced reliance on the federal civil service statute, Petitioner Price submits certiorari is appropriate so that the Court of Appeals' decision may be reviewed and reversed or so that this case might be remanded to the Circuit Court for reconsideration in light of *Johnson, supra*.

IV.

Certiorari Should Be Granted Because the Court of Appeals' Opinion, in Reviewing the Evidence to Determine Whether the District Court's Determination That the Patrol's Mandatory Retirement Age Violated the ADEA Was Clearly Erroneous, Failed to Consider the Question From the Standpoint of Whether Age Is a Bona Fide Occupational Qualification in Each Particular Occupation (i.e., Rank) Within the Patrol and Instead Considered the Question From the Standpoint of the Patrol Generally, And in So Doing So Far Departed From the Accepted and Usual Course of Judicial Proceedings As to Call for an Exercise of This Court's Power of Supervision.

Petitioner, a lieutentant in the Patrol, has maintained throughout his challenge to the Patrol's mandatory retirement age for its members that the upper echelon of the Patrol, i.e., the ranks of lieutenant, captain, major and colonel, engage in overwhelmingly administrative duties (desk jobs, to put it bluntly) and this distinction is crucial in any review of the lawfulness of the mandatory retirement policy. In its decision reversing the District Court's determination that the Patrol's mandatory retirement age violated the ADEA, the Court of Appeals ignored this distinction, in contravention of its own earlier decision, *EEOC v. City of St. Paul*, 671 F.2d 1162 (8th Cir. 1982).

In *St. Paul*, the Eighth Circuit held unequivocally, and appropriately Petitioner submits, that a district court, in making its inquiry as to whether age is a BFOQ, should examine the particular *occupation* within a business rather than the *business as a whole*. Otherwise, the Eighth Circuit held, the ADEA could be subverted:

> State law could create a class of "all state employees" and thereby allow the state to retire a clerk because he or she is too old to fight fires.

Id. at 1165-66. There is no indication that the District Court in this case failed to heed this aspect of *St. Paul* since, although the District Court held the Patrol's mandatory retirement age violated the ADEA with respect to *all* ranks within the Patrol, the District Court made specific findings distinguishing between the ranks with respect to duties, physical demands, etc. The Court of Appeals' majority, however, in its vigorous review of the evidence, ignored the overwhelming evidence that high-ranking Patrol members such as Petitioner Price are engaged only rarely, if ever, in physically taxing activities as part of their responsibilities. In its failure to consider whether age was a BFOQ *by rank*, the Court of Appeals' majority failed to consider the following pertinent findings of the District Court which had the advantage of listening to and observing the witnesses in judging their credibility.

1. "As the rank of a Patrol member increases the frequency with which members are exposed to psysically strenuous or dangerous activities decreases." *EEOC v. Missouri State Highway Patrol,* 555 F.Supp. 97, 99-100 (W.D. Mo. 1982).

2. "The Superintendent, and the majors, lieutenants and captains spend the overwhelming majority of their time performing administrative work." *Id.* at 100.

3. "[I]n the first five months of 1982, lieutenants were responsible for only 10 out of 106,937 arrests, or .01%; they were responsible for 102 out of 273,098 arrests, or .04% in 1979; they were responsible for 32 out of 279,648

arrests, or .01% in 1980; and they were responsible for 64 of 287,524 arrests, or .02% in 1981." *Id.*[1]

4. "Major Englehard, who has a heart condition, was found by his commanding officer to be able to perform the most physically demanding responsibilities of a major's duties." *Id.*

5. "Captain Cassady, who suffers from arthritis and high blood pressure, was found by his commanding officers to be able to perform the duties of the Director of Construction and Maintenance." *Id.*

6. "Captain Maddox who has a heart condition, was found to be able to perform his duties as Bureau Director of the Criminal Division." *Id.*

7. "A partolman's maturity, judgment and ability to deal with people increases with age and experience." *Id.* at 101.

In failing to consider the consequences of the evidence on a *rank-by-rank basis,* the Court of Appeals also ignored the following evidence:

8. Lt. Col. Van Winkle testified that even when patrolling on "saturation" days when on occasion some higher ranking Patrol members are assigned road duty that there were generally other men in the same area that would handle accidents rather than himself.

9. Lt. Col. Van Winkle further testified that he was never called upon to make any arrests, engage in high speed

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1. We note that this evidence was supplied by *the Patrol.* Realizing that its mandatory retirement age was in jeopardy and aware of the "split" ruling in *St. Paul* wherein the mandatory retirement age was upheld for firefighters, but invalidated for the high-ranking District Fire Chiefs, the Patrol obviously was attempting to save its retirement age for the lower ranks by showing that they were out on the road making arrests.

chases and never had to chase any suspects on foot during the "saturation" duty.

10. Petitioner Price testified that occasionally he gets on the road, but generally accompanies other patrolmen.

11. Petitioner testified that he could engage in a high-speed chase if called upon to do so, that he could handle a situation involving an unruly drunk, that experience played a great part in performing his duties and that because of the experience factor he was now a better officer than when he had been in the Patrol for five years.

12. Superintendent Hoffman testified that as colonel he has not made any arrests. He testified that the job of patrolman was physically more taxing for people working on the road day in and day out than for those with administrative duties.

13. Trooper B.J. Matthews testified that although officers of the rank of lieutenant and above will stop and render assistance on the road, the usual practice is to call in a road officer for assistance.

It was truly remarkable how much testimony supporting Petitioner Price's contention that the high-ranking officers' duties were substantially administrative in nature *was elicited from the Patrol members paraded in by the Patrol* to testify. The significance of the Court of Appeals' majority's failure to consider this and the above findings of the District Court and its consequent failure to follow its own *St. Paul* decision is obvious, inexplicable and warrants the exercise of this Court's supervisory power.

CONCLUSION

For all of the foregoing reasons, Petitioner Calvin M. Price submits that a writ of certiorari directed to the Court of Appeals for Eighth Circuit should issue.

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